ance with the intention of legislature. It is to be noted that the requirement with regard to pleading a time bar under the statute of limitation which is acquired after the lapse of the statutory period is an accrued right, even though it arises under an Act which is procedural. Lord Brightman when considering this point in the Privy Council in *Yew Bon Tew & Anor.* v. *Kenderaan Bas Mara*[6] did not agree with the generality of the proposition stated by Lord Denning M.R. in *Mitchell* v. *Harris Engineering Co. Ltd.*[9] that the statute of limitation does not confer any right on the defendant, but it only imposes a time limit on the plaintiff. He was of the opinion that an accrued entitlement on the part of a person to plead the lapse of limitation period as an answer to future proceedings is just as much a "right" as against any statutory or contractual protection against a future suit. I agree and adopt this principle. In my view, Order 15 rule 1 must be construed in the light of this important principle.

I read the words "to alter the capacity" in paragraph (4) to mean to modify or substitute the capacity and does not extend to add to the capacity in which the party has sued. If an amendment is allowed to add a party to the writ, it will amount to adding a new party apart from adding a new cause of action. What the Magistrate's Court did in the present case was to allow amendment by allowing the respondent who was already suing as the plaintiff in the representative capacity to be added as the second plaintiff in his personal capacity after the expiration of the limitation period. That, in my opinion, violates the statutory limitation because it takes away the accrued right of the appellant to plead the lapse of limitation period. Secondly, I do not think it is the intention of legislature to allow such amendment at that stage. It is not a technical defect because it introduces a new party to the action and leave to amend should have been applied for prior to the expiry of the statutory period of limitation.

A similar situation arose in *Braniff* v. *Holland* (*supra*). It was an application to amend the writ to include the second defendant after the statutory period of limitation has expired. Originally the plaintiff sued the first defendant for damages in respect of injuries he had sustained while working as an employee of the first defendant. At first, the first defendant applied for leave to issue third party notice against the second defendant claiming indemnity against any damages which might be awarded, but that was refused by the Master. Subsequently, by mutual arrangement between the plaintiff and the first defendant, the plaintiff applied for leave to amend the writ and statement of claim by joining the second defendant. The application was allowed, but subsequently on appeal by the second defendant the writ was set aside on the ground that the period of limitation has expired when the plaintiff's application was made. The appeal to the Court of Appeal was also dismissed.

The *ratio decidendi* was that as conceded by counsel for the plaintiff with whom Widgery L.J. agreed, the case did not come within paragraphs (3), (4) and (5) of the rule which are the directly relevant paragraphs when considering amendments made after the expiry period of limitation. I am of the view that the case before me is in the same category. It has not come within the ambit of paragraph (4), and for that matter under paragraphs (3) or (5). It is therefore not just to grant leave to amend.

For these reasons, I would allow the appeal with costs.

Appeal allowed.

Solicitors: *Albar, Zulkifli & Yap.*

YII SUOK TING v. SIBU MUNICIPAL COUNCIL

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) May 6 & September 12, 1985]

[Kota Kinabalu – Supreme Court Civil Appeal No. 24 of 1985]

Administrative Law – Application for orders of mandamus and certiorari – Permit issued by Municipal Council – Allegation that Municipal Council through its Deputy Chairman had not acted fairly – Evidence by affidavit – Application to cross-examine Deputy Chairman – Appeal against refusal – R.H.C. 1980, O.38 r.2(3).

In this case the appellant had applied for orders of mandamus and certiorari against the respondent council. In her affidavit in support of the application the appellant alleged, *inter alia*, that the respondent through its Deputy Chairman had not acted fairly towards her, in refusing to renew her permit to trade. The Deputy Chairman of the respondent council in his affidavit in opposition challenged the allegations of the appellant against the respondent as to the grounds relating to the non-renewal of the appellant's permit to trade. The appellant applied for an order requiring the attendance of the Deputy Chairman for cross-examination. This was refused. The appellant appealed.

Held: cross-examination on affidavit in such a case will only be allowed for special reasons. The courts are unwilling to permit a person in a judicial position to be subjected to cross-examination as if he were a party to the proceedings.

Cases referred to:

(1) *R.* v. *Stokesley, Yorkshire Justices, Exparte Bartram* [1956] 1 W.L.R. 254.
(2) *Badat bin Drani* v. *Tan Kheat* [1953] M.L.J. 67.
(3) *R.* v. *Paddington Valuation Officer, Exparte Peachey Property Corporation Ltd.* [1965] 2 All E.R. 836, 841.
(4) *Ridge* v. *Baldwin* [1964] A.C. 40.
(5) *Anisminic* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.
(6) *In re an application by Loke Wan Tho* [1956] M.L.J. 149, 150.
(7) *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, 75.
(8) *R.* v. *I.R.C. Exparte National Federation of Self-Employed and Small Businesses* [1982] A.C. 617, 641.
(9) *Squibb United Kingdom Staff Association* v. *Certification Officer* [1979] I.C.R. 235; [1979] 2 All E.R. 452.
(10) *O'Reilly* v. *Mackman* [1982] 3 All E.R. 1124, 1131-1132.

SUPREME COURT.

S.C. Chong for the appellant.
S. Sahathevan for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): The appellant was granted leave by the High Court, Sibu, *inter alia*, to apply for the following orders:

(a) an Order of Mandamus directed to Sibu Municipal Council (hereinafter called "the Council") directing the Council to allow the applicant to renew the Permit namely Green Card No. 25/VS/LM/81 (hereinafter referred to as "the Permit"): and

(b) an Order of Certiorari to remove into this Honourable Court for the purpose of its being quashed the Order made by the Council dated June 15, 1984 ordering the applicant to vacate her stall within three days from the date thereof;

and subsequently applied by way of Originating Notice of motion under O.53 r. 2 for the Orders abovementioned.

The learned Judge found the following facts to be uncontroverted:

For more than six years the appellant had traded as a hawker selling salted vegetables at the Lembangan Market, Sibu under a Permit described as Green Card No. 25/VS/LM 81 issued by respondent. On or about June 15, 1984 she received a letter signed by the acting Health Superintendent of the respondent requiring her within three days to vacate her stall allegedly on the ground that she had not renewed her Permit since January 1, 1984.

In her affidavit in support of the application for leave, the appellant alleged *inter alia* that the respondent through its Deputy Chairman had not acted fairly towards her in that, in refusing to renew her Permit to trade, it was motivated by political bias against her; that she was given no opportunity to make representation; and that it had exceeded its jurisdiction. On the other hand, the affidavit in opposition of the Deputy Chairman of the respondent challenged all the allegations made by the appellant against the respondent as to the grounds relating to the non-renewal of the appellant's Permit to trade. This affidavit in opposition alleged that it was through the fault of the appellant herself that her Permit to trade had not been renewed and that, in effect, there was no question of any political or any bias. The Deputy Chairman's affidavit was supported by the affidavits of two other functionaries of the respondent council which in effect alleged that it was the appellant who had failed to pay the appropriate Permit fees and thereby renew her Permit to trade, this failure being through no fault of any of the respondent's officers.

Originally the appellant had applied for an order requiring the attendance of the Deputy Chairman and one other for cross-examination on their respective affidavits, but at the commencement of proceedings in the court below, it was indicated that the application was to be restricted to the former only.

This is an appeal against the refusal to allow the application.

The contention raised on behalf of the appellant is that cross-examination should be allowed whenever the justice of the case so requires. However having in mind what was held in *R.* v. *Stokesley, Yorkshire, Justices, Ex Parte Bartram*[1] we were urged that in any event this is a very remarkable and a very exceptional case which would justify leave to cross-examine.

Power to order cross-examination.

It is admitted that the court can make an order for cross-examination under O.38 r. 2(3) of the Rules of the High Court 1980. However a glance at the notes in the *White Book 1967* on which our 1980 RHC is based, seems to indicate that this right to cross-examine is not unrestricted.

The main thrust of the appellant's argument is that during the last thirty years, since the *Stokesley* case, the principles of administrative law have developed a great deal and that this issue must be regarded in the context of that development.

It was urged on behalf of the appellant that this is quite independent of the procedural changes introduced in England by the new RHC Order 53, Judicial Review in 1977.

We shall refer to only some of those instances referred to in counsel's submission. Thirty years ago it was argued certiorari would not issue to quash a void order as distinct from a voidable order because it was said that there is nothing to quash, citing *Badat bin Drani* v. *Tan Kheat*[2] and *R.* v. *Paddington Valuation Officer ex parte Peachey Property Corporation Ltd.*[3] as authorities.

But in both *Ridge* v. *Baldwin*[4] and *Anisminic* v. *Foreign Compensation Commission*[5] the House of Lords made it clear that there are no degrees of nullity. The fallacy that certiorari will not lie to quash nullities died a natural death since this remedy has been constantly used to quash acts which were *ultra vires* and therefore nullities (see *H.W.R. Wade* on Administrative Law, 4th edn. Page 542, 543).

Another instance cited is that thirty years ago certiorari would only issue to an authority exercising judicial or quasi judicial functions, not to an authority exercising purely administrative functions – see *In re An Application by Loke Wan Tho*[6] at page 150 citing the Privy Council decision in *Nakkuda Ali* v. *Jayaratne*[7].

Again *Ridge* v. *Baldwin (supra)* reviewing the authorities extensively has shown this to be a fallacy. In his leading speech Lord Reid demonstrated how the term "judicial" had been misinterpreted as requiring some super-added characteristic over and above the characteristic that the power affects some person's rights. The mere fact that the power affects rights is what makes it 'judicial' and so subject to the procedure required by natural justice. In other words a power which affects rights must be exercised 'judicially' *i.e.* fairly, and the fact that the power is administrative does not make it any the less 'judicial' for this purpose.

The decision in *Nakkuda Ali* v. *Jayaratne* was therefore criticised as being based on 'a serious misapprehension of the older authorities' and therefore cannot be regarded as authority.

Then again counsel cited a passage from the judgment of Lord Diplock in *R.* v. *I.R.C. Ex parte National Federation of Self-Employed and Small Businesses*[8] where his Lordship said:

> "To revert to technical restrictions on *locus standi* that were current 30 or more years ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English Courts in my judicial lifetime."

Counsel's object, no doubt, was to emphasise his point that on matters of *locus standi* as in a variety of other matters there has been development in administrative law.

Another reason given by counsel for the reluctance by English courts to allow cross-examination was that in the early days Justices of the Peace were local authorities charged with administrative as well as judicial duties and were also empowered to issue and renew licences. It is therefore understandable, he argues, that the reviewing courts were reluctant to create a situation where justices of the inferior courts were at risk of being cross-examined. Since Mr. Tien, the Deputy Chairman of the Council is not a justice, and the Sibu Municipal Council is not a judicial body, he contends that the same reason or cause for reluctance to allow cross-examination does not exist.

We do not think that this latter argument is correct. As was held in *Ridge* v. *Baldwin (supra)* a power which affects rights must be exercised judicially *i.e.* fairly and the fact that the power is administrative does not make it any the less "judicial" for that purpose. Thus in *Squibb United Kingdom Staff Association* v. *Certification Officer*,[9] the Association had applied to the Certification Officer pursuant to section 8(1) of the Employment Protection Act 1975, for a certificate that it was an independent trade union within the meaning of section 30(1) of the Trade Union and Labour Relations Act 1974. The Certification Officer determined that the association was not an independent trade union because it could not be

said to be free from liability to interference within section 30(1) (b) of the Act of 1974. The Employment Appeal Tribunal allowed the association's appeal after hearing in which the Certification Officer had himself given evidence and been cross-examined at length.

What Lord Denning M.R. said at page 244 on an appeal by the Certification Officer, gives a more complete answer to this great reluctance by the English Courts to allow such cross-examination:

". . . But there is a difficulty about parties. There were no objectors here. The objecting union did not appear. The only person who did appear was the certification officer himself. He appeared so as to oppose the appeal and justify his own decision. He gave evidence as if he was a party and was cross-examined at length as if he was a party. I must say I think that was undesirable. The certification, officer is in a judicial position. He has to be impartial and independent. He has to give his determination and support it by written reasons. I cannot believe it is right that he should be cross-examined on those reasons. He should not be cross-examined any more than a justice of the peace or a planning inspector or an arbitrator or any of the many people who have to make decisions from which there is an appeal. Such a person can be asked to supplement his reasons and to give further reasons; or the matter can be remitted to him for reconsideration. But I think it is undesirable that he should be put into the witness-box and cross-examined as if he was a party."

We would say that therein lies the answer. The English Courts were unwilling to permit a person in a judicial position to be subjected to cross-examination as if he was a party to the proceedings.

It was further submitted to us that the principles of administrative law has developed considerably during recent years and that the development is not because of the new form of O.53 in the English Rules, a change which he argues is largely procedural and not substantive. For our Courts to apply the strictly "old fashioned" approach of Lord Goddard in the *Stokesley Justices'* case is, he says, to ignore such developments in the administrative law earlier alluded to and to revert to the "technical restrictions" referred to by Lord Diplock in *R.* v. *I.R.C. Ex parte National Federation of Self-Employed in Small Businesses (supra).*

We were referred to a passage in the recent case of *O'Reilly* v. *Mackman*[10] where Lord Diplock said:

". . . Your Lordships may think this an appropriate occasion on which to emphasize that whatever may have been the position before the rule was altered in 1977, in all proceedings for judicial review that have been started since that date the grant of leave to cross-examine deponents on applications for judicial review is governed by the same principles as it is in actions begun by originating summons: it should be allowed whenever the justices of the particular case so requires."

It was argued that the judge in the Court below was wrong in holding that the "justice" approach was a post-1977 test.

As we understand it, we are being urged to accept the contention that appellant's application is made under O.38 r. 2(3) of the R.H.C. 1980 which is the same as the English O.38 r. 2(3). It would follow, according to this view, that the right to cross-examination does not depend on the English new rule for its existence, but was in existence long before that amendment. Yet we are asked to apply the "justice of the particular case" approach.

However it cannot be gainsaid that prior to the 1977 amendment to the English O.53, it will only be for special reasons of the *R.* v. *Stokesley* type that cross-examination on affidavit will be allowed.

Setting out in full the passage from *O'Reilly* v. *Mackman* at pages 1131/1132 on which appellant relies will show how counsel has misapprehended what the learned Law Lord meant:

"Those disadvantages, which formerly might have resulted in an applicant being unable to obtain justice in an application for certiorari under Ord. 53, have all been removed by the new rules introduced in 1977. There is express provision in the new r. 8 for interlocutory applications for discovery of documents, the administration of interrogatories and the cross-examination of deponents to affidavits. Discovery of documents (which may often be a time-consuming process) is not automatic as in an action begun by writ, but otherwise Ord. 24 applies to it and discovery is obtainable on application whenever, and to the extent that, the justice of the case requires; similarly Ord. 26 applies to applications for interrogatories; and to applications for cross-examination of deponents to affidavits Ord. 28, r.2(3) applies. This is the rule that deals with evidence in actions begun by originating summons and permits oral cross-examination on affidavit evidence wherever the justice of the case requires. It may well be that for the reasons given by Lord Denning MR in *George* v. *Secretary of State for the Environment* (1979) 38 P. & CR. 609, it will only be on rare occasions that the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial renew. This is because of the nature of the issues that normally arise on judicial review. The facts, except where the claim that a decision was invalid on the ground that the statutory tribunal or public authority that made the decision failed to comply with the procedure prescribed by the legislation under which it was acting or failed to observe the fundamental rules of natural justice or fairness, can seldom be a matter of relevant dispute on an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that

they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in *Edwards* v. *Bairstow* [1955] All E.R. 48 at 57-58, [1956] A.C. 14 at 36; and to allow cross-examination presents the court with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body on whom the exclusive jurisdiction to determine facts had been conferred by Parliament. Nevertheless, having regard to a possible misunderstanding of what was said by Geoffrey Lane L.J. in *R.* v. *Hull Visitors, ex p St. Germain (No. 2)* [1979] 3 All E.R. 545 at 553-554, [1979] 1 W.L.R. 1401 at 1410, your Lordships may think this an appropriate occasion on which to emphasise that, whatever may have been the position before the rule was altered in 1977, in all proceedings for judicial review that have been started since that date the grant of leave to cross-examine deponents on applications for judicial review is governed by the same principles as it is in actions begun by originating summons; it should be allowed whenever the justice of the particular case so requires."

Express provision made for cross-examination in the 1977 amendment was considered necessary, because even applications for leave to cross-examine was virtually unheard of, despite the existing provisions of O.38 r. 2(3) (see *O'Reilly* v. *Mackman* p. 1130 g).

The drawback of the pre-amendment practice and procedure is confirmed by the following passage in *H.W.R. Wade,* Administrative Law, 4th Edition at p. 551:

"Evidence is given on affidavit, *i.e.*, in writing rather than orally; and it is exceptional for the court to allow cross-examination on the affidavits. The court's only means of deciding disputed issues of fact in the normal manner is to direct a special issue to be tried, but that is a roundabout procedure, and the court may dismiss the application rather than a resort to it. If the case turns upon a conflict of evidence, certiorari and prohibition may therefore involve difficulties. It has been said of them that they

> 'afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. But they are not designed to raise issues of fact for the High Court to determine de novo . . . . . where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it there and then. But where the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere' ."

It is tempting to echo that part of the judgment of Whyatt C.J. in *In re An Application by Loke Wan Tho* cited by the learned Judge in the court below:

". . . But *certiorari* is not an exclusive remedy, and if proceedings on the Crown side are not appropriate in a particular case because there is a dispute as to facts, involving a conflict of evidence, then it is open to the person aggrieved to pursue other remedies in other proceedings where provision is properly made for pleadings and for discovery. ..."

We would agree with learned Judge in the court below that the conflict of evidence here does not constitute the sort of exceptional circumstances envisaged in the *Stokesley Justice* case which would justify an order to cross-examine, and also since our procedure in its unamended state is dissimilar to the corresponding English O.53 after its 1977 amendment, the test for allowing cross-examination should not be "whenever the justice of a particular case so requires", but the more stringent one in the *Stokesley* case.

It is obvious that the new approach to cross-examination taken in *O'Reilly* v. *Mackman* (*supra*) is not the result of mere recent development in the adminstrative law, but because of the express provision contained in the new O.53 r. 8 of the English rules.

It may well be that our Rules Committee will in due course elect to introduce amendment to our rules which the *Supreme Court Practice 1979* refers to as "a most beneficient reform in the practice and procedure relating to administrative law". Of particular significance to this appeal would be the machinery of interlocutory applications such as discovery of documents and interrogatories and orders for the respondents of an affidavit to attend for cross-examination under the new English Order 53 r.8.

Until then it would be appropriate that we should be guided by the pre-amendment English practice.

The application that this Court should hear the substantive application on its merits should it refuse leave to cross-examine has been abandoned.

We would therefore dismiss this appeal with costs here and below. Deposit (in Kuching) to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Chong Bros.; Battenberg & Talma.*